

ILLINOIS POLLUTION CONTROL BOARD
June 20, 1974

CAMEO DEVELOPMENT INC.)
PETITIONER)
)
)
v.) PCB 74-109
)
)
ENVIRONMENTAL PROTECTION AGENCY)
RESPONDENT)
)

MR. JOSEPH WRIGHT, JR., ATTORNEY, in behalf of CAMEO DEVELOPMENT, INC.
MR. JOHN H. REIN, MR. HENRY HANDZEL, ATTORNEYS, in behalf of the ENVIRONMENTAL PROTECTION AGENCY

OPINION AND ORDER OF THE BOARD (by Mr. Marder)

This action involves a request for variance filed March 25, 1974, by Cameo Development, Inc., requesting relief from an Agency-imposed sewer ban (pursuant to Rule 921 [a] of Chapter 3). Additional information regarding this matter was filed on April 4th and April 11th. The Agency filed its recommendation which suggested that the requested relief be denied. Hearing was held on May 21, 1974, at the Effingham City Hall.

Petitioner, Cameo Development, Inc., owns 5.78 acres of land in the city of Effingham. It is the intent of Petitioner to utilize this land for the construction of a 122-unit Days Inn Motel, a 100-seat Tasty World restaurant, and a three-pump gas station (R. 22). Although mention of a gas station was not included in the petition for variance, it was brought out on hearing. The hearing officer elected to allow testimony in that no undue surprise was evident, and the station was not a major factor in the waste load flow. We concur in this finding. Petitioner now finds that due to an Agency-imposed sewer ban, it can not obtain the required sewer extension permit and thus cannot commence construction. Petitioner further alleges that the curtailment of construction would lead to an arbitrary and unreasonable hardship in that it (hardship) was not self-imposed. The Agency counters that the hardship was indeed self-imposed, and that the variance request should be denied.

The Board in deciding a case of this nature must go to the facts regarding hardship, environmental impact, and alternates in order to reach a reasoned decision. A history of the facts surrounding this case is thus in order.

Mr. Richard H. Coady (president, Cameo Development Corp.) testified as to the history of this project. The land was purchased in November,

1973 (R. 27), and before this time an attempt was made to verify the existence and availability of utilities in the area. Mr. Coody engaged Crossroads Realty of Effingham as their agent in this search. Mr. Coody received a letter (Exhibit A) dated November 16, 1973, signed by a Mr. Lowell Wines, Superintendent of the Street and Sewer Department of Effingham, stating in pertinent part:

"This letter is to inform you that the city sewer facilities are within 70 feet of the property on the West Fayette Avenue, that the facilities are adequate for installation that you are planning to do. It will be necessary for you to obtain a permit from the Illinois State Highway Department for easement on their right of way. The city tap fee is fifteen dollars (\$15) per tap."

In addition the letter bore the handwritten notation, "We need an Environmental Protection Agency permit." Mr. Coody then checked with the city of Effingham as to the problems which would or would not be concerned in obtaining an Environmental Protection Agency permit (R. 41). He was informed that permits for sewer extensions were being reviewed, and received no indication that there would be any problem in obtaining a permit (R. 42). Mr. Coody then purchased the above-mentioned land and proceeded with engineering. A loan for construction was obtained in December, 1973. A permit was filed with the Environmental Protection Agency in March, 1973 (Exhibit 5, R. 31). Upon hearing that the Environmental Protection Agency had stopped issuing permits Mr. Coody filed the instant variance petition. The Agency sewer ban went into effect in February of 1974.

The rationale for this ban along with interim steps being taken by the city of Effingham weigh heavily in this case. The city of Effingham owns and operates a secondary treatment plant consisting of primary settling, anaerobic digestion, trickling filters, and final settling with recirculating pumps and chlorination. The plant was constructed in 1957 at a rated capacity of 1.27 mgpd. Since 1970 the city has undertaken to improve the capacity of the plant by cleaning the digester, rebuilding internal piping, increasing the size of the recirculating pump, and going to alternate sludge disposal (R. 47). The city has also taken steps to remove a large portion of storm water from the combined system, and this storm water now discharges into the stream (R. 50) (done March 1974). The city is presently (under Agency permit R. 51) adding prechlorination and converting the trickling filter from a single stage to a recirculating system. Chemical settling agents will also be added to reduce suspended solids. This work is being conducted in an attempt to obtain a 20/25 BOD/SS effluent (R. 53). This project is due for completion in July 1974.

Under cross-examination the subject of increased capacity due to the above improvements was questioned. It is clear that the improvements do not guarantee additional capacity; however, there is a substantial chance for success. Discussions as to whether or not the Effingham plant can meet the required 20 BOD/25 SS requirement were long and involved. Again, there is no way to determine whether or not the plant will indeed meet this criteria. However, this question is of central importance in the instant case, in that it swings the balance of other

testimony. One must then explore the Agency's seeming intent in granting a permit for these improvements, and try and ascertain what the Agency's belief was prior to granting said permit.

The Agency recommendation, P. 6, states as follows:

"However, Agency engineers strongly believe that even after the improvements are completed, the plant will not be able to meet the twenty mg/l BOD₅ and twenty-five mg/l suspended solids standard of Rule 404-B of Chapter 3."

Mr. Broms (Environmental Protection Agency Permit Section), when asked about this quotation, said,

"Well, the strongly believes, I won't say I'm negative on it, I have my doubts, I won't say emphatically it will, I won't say emphatically it won't." (R. 81)

Mr. Broms further testified that due to the design differing from normal practices one could not predict with certainty the outcome of the project. (R. 82) He further testified that the permit was issued to see if the facility would meet the standards and then could be perhaps rerated to 1.75 mgpd (R. 84).

Mayor Clyde Martin (city of Effingham) testified as to the reasons for the city entering into the abovementioned improvements. Mayor Martin testified that he was led to believe (by the Environmental Protection Agency) that the improvements would allow the city to meet the applicable regulations and thus continue to grow. He referred to a call he placed to the Environmental Protection Agency from which he learned that the city had "no problem" (R. 109).

Mayor Martin further testified as to a meeting held in the Environmental Protection Agency offices in Springfield at which time the Environmental Protection Agency stated that the improvements would help the city get off restrictions - however, no guarantee was made (R. 116). Mayor Martin stressed that the city committed to expend \$40,000 on the basis that they were led to believe that this would "get by" (R. 117). Mr. Lowell Wines, Superintendent of Streets and Services, city of Effingham, was also present at the above meeting. Mr. Wines also testified that at no time did the Agency express a firm opinion as to whether the improvements would or would not meet the applicable criteria (R. 125).

Agency Exhibit #1 is a letter from the Illinois Environmental Protection Agency notifying the city of Effingham that it is being put on critical review (dated February 10, 1972). Critical Review is a process whereby the Agency informs the city that its plant is approaching design capacity and that the Agency will be closely scrutinizing any new permit applications (R. 92). This letter (Exhibit 1) relates the following design and actual loading:

Design Hydraulic Flow	1.20 mgd
Design Pop. Equivalent	10,500

Design BOD Load	1785 #/day
Average Flows 5 Month 1971	1.42 mgd
Average Pop. Equiv.	6890

From the above the Agency concludes that:

"The Effingham sewage treatment facilities are hydraulically overloaded even during periods of no precipitation while some reserve organic capacity remains."

The Agency further speculates that a large discharge of relatively contaminant-free water is entering the system.

Petitioner's Exhibit 1 is a letter from the state Environmental Protection Agency dated February 4, 1974. This letter informed the city of Effingham that it was to be put on restricted status. Restricted Status means that the Agency will no longer issue permits for the subject system. The following data details the rationale for this decision. (Note the change in design load - no reason given.)

Design Hydraulic Flow	1.27 mgd
Design Pop. Equiv.	11,500
Average Flows (low flows)	1.676 mgd
Average Flows (high flows)	2.073 mgd
Average Organic Loading	10.275 PE

The letter also details very high BOD/and suspended solids of 85 mg/l and 86 mg/l respectively. This letter also indicated that permits granting a population equivalent of 2,221.3 and flow of 202,130 gpd were in the works, which would further complicate matters. Mr. Fitzpatrick (city engineer) stated (R. 71) that a number of the above permits will not be exercised for quite some time if at all, and his projection would be an addition of 830 PE. If this were the case, the total organic load would then be 11,105 vs. a design of 11,500.

At this time, then, it would seem that the organic loading is close to capacity, and the hydraulic load is somewhat above capacity. This analysis places heavy weight on the abovementioned testimony that a substantial portion of the storm water was removed from the system in March 1974.

Mr. G. Schwager testified as to how samples are handled at the Environmental Protection Agency laboratory, and as to the results of samples run at that laboratory. There was much controversy over the validity of the samples; however, this point was somewhat moot. The Agency recommendation (Pg. 5) details results of samples run on the city of Effingham's effluent. These results show the city to be clearly in violation of the applicable standards. It is important to note that these samples were taken before the city completed the abovementioned improvements (some improvements are still underway), and reflect only that the Agency was correct in issuing a sewer ban. These analyses give no indication of what the effluent will be after improvements are completed.

All of the above may be summarized to state that although the Agency properly imposed a sewer ban, the city of Effingham has been diligently pursuing a plan which has the potential of bringing its plant into compliance. This means that should a variance be allowed Cameo Developers, the impact of this added effluent (1864 gpd at 300 mg/l BOD₅) should have much less effect on the receiving stream than it would in a case where no improvement is underway. The question then must go to the hardship involved.

Mr. Coody related the economics involved in the project. He stated that a price of \$32,900 per acre was paid for the land, which was significantly greater than its value for residential property. He explained that the \$32,900 per acre was reasonable in that his project was a high density area (R. 16). Mr. Coody anticipates that the land would be worth \$5,000 an acre should he not be able to build (R. 17). Mr. Coody also related that if he were to lose his loan and then have to renegotiate at a later date, he would potentially incur a loss of up to \$200,000 (R. 19). Mr. Coody further related engineering costs of \$30,000. Various other commitments were mentioned, totaling approximately \$380,000. Although Mr. Coody conceded that some of the above commitments could be cancelled, he had no way of knowing what his loss would be (R. 27).

The Agency contends (see Agency Brief Pg. 9-10) that the financial hardship is vague and at best defers the enjoyment of the subject property rather than terminates its use (Brief Pg. 13). The Board must agree that this is true; however, the hardship, although vague, is, by facts elicited, substantial. While it is true that some of the losses can be recouped in time, no one can guess how long this time will be. The city of Effingham enjoys priority #46 (R. 75), and Mr. Fitzpatrick (engineer for Effingham) predicted that federal money should be available during 1974-1975. The city has completed its in-flow-infiltration analysis and could start construction during late 1974. This, however, is an estimate and not a firm date. The Board feels that delay in utilization of said property could be substantial indeed.

The Board, then, must weigh the potential hardship against the environmental harm which would ensue should the variance be granted. This Board has faced similar situations many times in the past. In instances such as Viking Investment Co. v. Environmental Protection Agency, PCB 73-236, and Meridian Community School District #1 v. Environmental Protection Agency, PCB 73-349, this Board has granted variance due to conditions which combined with other factors showed substantial hardship. In many other cases, such as Monyek v. Environmental Protection Agency, PCB 71-80, the Board has refused to grant variance.

In the instant case the Board takes note that there is a reasonable chance that the receiving plant will comply with applicable regulations shortly. Agency witnesses testified that such is the case. The Board finds that this factor involves a condition which is unique in sewer ban cases, and must be given serious consideration. In light of this fact, and with cognizance that a substantial hardship will occur, this Board will grant variance.

We emphasize that the unique factors surrounding this case have led to this decision. In future cases the Board will ask for proof of operation of the Effingham plant before granting variances. The improvements are scheduled for July, 1974, and data of this nature should be shortly forthcoming. We would again confirm our position in Feige v. Environmental Protection Agency, PCB 72-192, wherein the Board noted that completion of construction or substantial steps towards such construction can be clearly used to judge hardship. This position, however, was founded without the rather unique situations of this case.

This Opinion constitutes the findings of fact and conclusions of law of the Board.

ORDER

IT IS THE ORDER of the Pollution Control Board that variance is hereby granted to Cameo Development, Inc., from the Agency sewer ban in the city of Effingham to connect a 122 unit Days Inn, a 100-seat Tasty World restaurant, and a three-pump gas station.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted by the Board on the 20th day of June, 1974, by a vote of 5 to 0.

Christan L. Moffett